IN THE SUPREME COURT OF THE STATE OF DELAWARE

LARRY DAVIS,	§	
	§	No. 423, 2010
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID No. 0912007848
	§	
Plaintiff Below-Appellee.	§	

Submitted: December 8, 2010
Decided: February 1, 2011

Before **HOLLAND**, **BERGER** and **RIDGELY**, Justices.

O R D E R

This 1st day of February 2011, it appears to the Court that:

(1) Defendant-Below/Appellant, Larry Davis, appeals from his Superior Court jury conviction for possession of cocaine. Davis contends that the trial judge abused her discretion in excluding a hearsay declaration against penal interest. We find no merit to Davis's appeal and affirm.

(2) One Saturday afternoon, Sergeant Bruce Pinkett observed two individuals, Eugene Brown and Larry Davis, loitering in a church parking lot. When assisting units approached the two men, who are cousins, they fled. Corporal Charles Sheppard approached from another direction, cut them off, and

ordered them to the ground.[1] Both men complied, but Davis placed his right hand under his stomach. Corporal Travis McDermott handcuffed Davis, rolled him over, and immediately observed a folded one-dollar bill where Davis's hand had been. McDermott found cocaine inside the bill.

(3) Davis was charged by indictment with possession of cocaine, possession of drug paraphernalia, criminal trespass third degree, and loitering. Davis informed the trial judge that he intended to call his grandmother, Ethel Watkins, as a witness. The trial judge permitted counsel to question Watkins through *voir dire* prior to trial. Watkins testified as follows:

> Q: Did you ask [Eugene] about the circumstances surrounding Larry getting charged with drug offenses.
>
> A: Yes, sir.
>
> Q: What did you ask him?
>
> A: I asked him, why did you allow Larry . . . to take a charge for you. I said, "Why did you do that?"
>
> Q: Well, you didn't see what happened. So, how do you know that the drugs weren't Larry's?
>
> A: It's because he confessed to me that they were.
>
> Q: Okay. When you say "he confessed to me they were" --
>
> A: He said, "They were my drugs," he said. . . .
>
> Larry had told me that he had -- he was crying, saying, they arrested me, and because they said that

[1] Sheppard testified that, from the time Brown and Davis loitered to the time McDermott discovered the cocaine, Sheppard never lost sight of Brown and Davis and that Brown made no "throwing" or "tossing" movements. Sheppard also testified that Brown and Davis were "three to four feet" apart while on the ground.

> the drugs were mine, and he said, they're not mine. So I approached [Eugene] and asked him about it at the bus stop and [Eugene] . . . said that "Yeah, they were my drugs."
>
> Q: Was he referring to the drugs that . . . Larry Davis was charged with possessing.
>
> A: Yes, sir.

(4) The trial judge prohibited Watkins from testifying about Brown's purported statement for the following reasons:

> I do not think that it meets the standard according to the law. . . .
>
> First of all, as to spontaneity, I find that under the circumstances, the interrogation by the grandmother, the accusations by the grandmother, and the fact that the statement was two to three days after the date of the arrest [] indicate that the statement was less than spontaneous, and also that it was not in close temporal proximity to the commission of the crime.
>
> Furthermore, the Court should also look at whether the circumstances in which the declarant made the statement indicated that he had an incentive to speak truthfully or falsely; and that gives me great concern in this matter, because there was testimony from Miss Watkins that Mr. Brown was a drug addict, and at least on one occasion was so high on speed that he tried to attack Miss Watkins. It is unclear, and it is not established by Miss Watkins, as to whether he was high or not at the time of the alleged statement to her, nor can it be said that he might not have an incentive to falsely take blame for the drugs in an effort to get back in good graces with his grandmother.
>
> So, for all those reasons, I cannot find that the statement Miss Watkins has proffered as to Mr. Brown being willing to take the weight for the drugs rather than Mr. Davis, I do not find that they fit within 804(b)(3) . . . .

(5) The matter proceeded to trial, and a jury convicted Davis of possession of cocaine. The trial judge sentenced Davis to one year at Level V, suspended for three months at Level IV, followed by six months at Level III and three months at Level II. This appeal followed.

(6) "[W]e review a trial judge's 'decision to admit or exclude evidence based on hearsay for abuse of discretion.'"[2] "[W]hether there is sufficient corroborative evidence to admit a hearsay statement against interest is a matter to be committed to the sound discretion of the trial [judge] and reversible only upon a showing of abuse of discretion."[3]

(7) Delaware Rule of Evidence 804(b)(3) provides that the following statement is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> A statement which [], at the time of its making, . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible *unless corroborating circumstances clearly indicate the trustworthiness of the statement*.[4]

---

[2] *Foster v. State*, 961 A.2d 526, 530–31 (Del. 2008) (quoting *Nalley v. State*, 935 A.2d 256, 2007 WL 2254539, at *2 (Del. 2007) (TABLE)).
Del.Supr.,2007
[3] *Ross v. State*, 482 A.2d 727, 741 (Del. 1984).
[4] D.R.E. 804(b)(3) (emphasis added).

(8) We have explained that, in determining whether "corroborating circumstances clearly indicate the trustworthiness of the statement," courts should consider the following factors: (1) "whether the statement was made spontaneously and in close temporal proximity to the commission of the crime," (2) "the extent to which the statement was truly self-incriminatory and against penal interest," (3) "the reliability of the witness who was reporting the hearsay statement," and (4) "the extent to which the statement was corroborated by other evidence in the case."[5]

(9) Davis argues that the trial judge erred in applying the first and fourth factors to the facts of this case. But, as to the first factor, the trial judge explained that the supposed statement resulted from "interrogation by [Watkins] . . . two to three days after the date of the arrest." Even though we have previously held that a statement made within "a few weeks" of a crime was in close temporal proximity,[6] the trial judge here focused more on the spontaneity component of the first factor because Watkins "interrogated" and "accused" Brown.

(10) As to the fourth factor, we have explained that "[i]f there is some corroboration to support the self-inculpatory statement that another person committed the crime for which the defendant is on trial, that evidence should be

[5] *Demby v. State*, 695 A.2d 1152, 1158 (Del. 1997) (citing *Outten v. State*, 650 A.2d 1291, 1296–97 (1994)).
[6] *See id.*

presented to the trier of fact."[7] But, here, Davis offered no other corroborating evidence. In fact, Corporal Sheppard testified that he never lost sight of Davis and Brown during the entire incident, and that he did not observe Brown transfer the cocaine to Davis during that time. The trial judge also was concerned about the veracity of the out-of-court statement.[8] In any event, we have explained that a trial judge should balance carefully the "total mix" of the four factors.[9] Here, the trial judge did that. Davis has not shown that the trial judge abused her discretion in excluding Watkins' testimony as to Brown's purported out-of-court statement against penal interest.[10]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[7] *See id.* (citing *United States v. Garcia*, 986 F.2d 1135, 1141 (7th Cir. 1993)).
[8] The trial judge explained: "It is unclear, and it is not established by Miss Watkins, as to whether he was high or not at the time of the alleged statement to her, nor can it be said that he might not have an incentive to falsely take blame for the drugs in an effort to get back in good graces with his grandmother."
[9] *See Outten*, 650 A.2d at 1297.
[10] *See Ross*, 482 A.2d at 741.